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IN THE

Supreme Court of the United States

October Term, 1960

Nos. 776 and 780

THE CALIFORNIA COMPANY AND
THE SUPERIOR OIL COMPANY, *Petitioners*,

v.

THE UNITED GAS IMPROVEMENT COMPANY AND
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Respondents

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief Amicus Curiae of the City of Philadelphia in Opposition to the Petitions for Certiorari

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DAVID BERGER
City Solicitor and Principal Law Officer
LEWIS KATES
Deputy to the City Solicitor
City Hall Annex
Philadelphia 7, Pa.

WILLIAM C. BURT
ROBERT M. BECKMAN
KOTEEN & BURT
1000 Vermont Ave., N. W.
Washington 5, D. C.
Attorneys for the City of Philadelphia

THE LEGAL INTELLIGENCER, 10 S. 5TH ST., PHILA. 6

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BRIEF AMICUS CURIAE OF THE CITY OF PHILADELPHIA IN OPPOSITION TO THE PETITIONS FOR CERTIORARI

OPINIONS BELOW

The order of the Federal Power Commission (R. 147-53) is reported at 22 FPC 252; the order denying rehearing (R. 179-81) is reported at 22 FPC 653. The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 283 F. 2d 817.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. §717r(b).

QUESTION PRESENTED

Was the court below correct in concluding (as have three other Courts of Appeals) that the Federal Power Commission, consistent with its responsibility to protect gas consumers under the Natural Gas Act as interpreted in this Court's *CATCO* decision,[1] could not issue unconditioned certificates for gas producer sales at a price representing a sharp increase over pre-*CATCO* contract prices in the same area, where the only support offered for the challenged price was the existence of other pre-*CATCO* decision prices in the area, certificated by the Commission prior to *CATCO*, on equally defective records and under an erroneous view of the law and where such decisions were under review?

INTEREST OF AMICUS CURIAE

The ultimate consumer has the major interest in any proceeding affecting the producer's initial price of gas. He has no other course but to pay the increases in his monthly bill which result from the failure by those appointed to regulate in the public interest, to react responsibly to the gas producers' efforts to increase basic prices of gas.

The City of Philadelphia represents over 2,000,000 inhabitants, 600,000 of whom are consumers of gas distributed by respondent, the United Gas Improvement Com-

[1] *Atlantic Refining Co. v. P. S. C. of New York*, 360 U. S. 378 (1959).

pany (hereinafter referred to as "UGI"), through the municipally owned gas distribution system.[2]

The City of Philadelphia appeared as amicus curiae in the Court below because the proposed initial prices would have the effect of increasing substantially the cost of gas to United Gas Pipeline Company, an increase which ultimately would be reflected in UGI's rates and would adversely affect the City, its inhabitants and its Philadelphia Gas Works.

The imposition of a price condition is of vital importance to the ultimate consumer. Unless a condition as to price is made to the certification, the only safeguard against consumer exploitation would lie in a subsequent determination under Section 5 of the Act that the price is unjustified. Obviously, however, this is an inadequate remedy since a Section 5 proceeding gives only prospective relief. Moreover, the determination of proceedings under Section 5 by this Commission is an unusually long process.

Therefore, the sole course open to the Federal Power Commission when presented with this record was, in exercise of its powers under Section 7 of the Act, to condition the grant of the certificate on the adoption of a lower initial price. Such a condition would bring the price under the provisions of Section 4 of the Act and would enable the producer to obtain the rate for which he had bargained. It would likewise guarantee that the consumer may recover refunds for monies paid should the rate subsequently be determined to be excessive. And it would not either deter other producers from entering the interstate market or deprive the instant producers of their proposed rates and resultant profits if they should prove justified.

Thus, the decision by the Federal Power Commission to issue a certificate without a price condition, thereby

[2] The City of Philadelphia owns the Philadelphia Gas Works which is operated by the United Gas Improvement Company as agent for the City. All profit, if any, inures to the benefit of the City, its operating agent receiving a flat management fee.

permitting to go into effect a price in excess of any price previously paid by United, a price 85 per cent higher than United's weighted average cost of gas, leaves consumers entirely bereft of effective protection against unwarranted price increases.

It is for these reasons that this Brief *Amicus Curiae* is filed.

THE WRIT SHOULD BE DENIED

Petitioners have not advanced one sound reason for the Court to issue a Writ of Certiorari in this proceeding. The Court below followed the letter and spirit of this Court's *CATCO* decision.

This Court declared that the Natural Gas Act must be administered so as to "afford consumers a complete, permanent and effective bond of protection from the excessive rates and charges."[3] The Court below cited and applied this Court's direction in *CATCO*, that "where the application on its face or on presentation of evidence *signals* the existence of a situation that *probably* would not be in the public interest," "a permanent certificate *should not be issued.*"[4]

Petitioners have attempted to change the focus of this Court's unequivocal holding in *CATCO*. Petitioners appear to urge that if *any* basis for a price increase can be found, an unconditioned permit should be issued.

However, this Court rejected a similar argument in *Transco Seaboard*.[5] Therefore, the Court below has properly applied this Court's *CATCO and Transco Seaboard* decisions. No need, indeed no question of substantial importance, is presented for this Court to grant certiorari

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[3] 360 U. S. at 388.

[4] 360 U. S. at 391. Emphasis supplied.

[5] *United Gas Improvement Co. v. FPC*, 269 F. 2d 865, rev'd 361 U. S. 195 (1959).

in order to reaffirm what it has already made abundantly clear and has been fully understood and correctly applied by the Court below as well as the three other Courts of Appeals which have been called upon to interpret and apply the *CATCO* decision.[6]

Moreover, it is of utmost significance that the Federal Power Commission has not challenged either the ruling of the Court below or the decisions of the other Courts of Appeals which similarly have reversed its decisions. There is no justification for adding to this Court's heavy burden by issuing certiorari in this proceeding when the Commission itself is not requesting further clarification of this Court's decisions interpreting Section 7 of the Act.

The Court below, in reversing the Federal Power Commission's approval of a sale price representing a sharp increase over pre-*CATCO* price levels, did no more than to merely reaffirm this Court's mandate in *CATCO* that the Natural Gas Act requires the Federal Power Commission to protect consumers by appropriate conditions against prices which may be unlawful, pending a determination in other proceedings of the producers' actual costs and revenue needs.

Petitioners' argument that the decision of the Court below unduly limits the Commission's discretion under Section 7 of the Act and handicaps the Commission in disposing expeditiously of producer certificate proceedings constitutes no basis for issuing certiorari. First, it is incorrect

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[6] *Texas Gas Transmission Corp., et al.*, 22 FPC 378, rev'd, *Public Service Comm'n v. FPC*, No. 15,461, CA DC (December 8, 1960), cert. pending sub nom. *Shell Oil Co. v. Public Service Comm'n*, Nos. 774, 793, Oct. Term 1960 (Opinion printed Shell Pet. 28—33); *Sunray Mid-Continent Oil Co.*, 22 FPC 361, rev'd, *United Gas Improvement Co. v. FPC*, No. 6280, CA 10 (January 23, 1961) (Opinion printed Shell Pet. 49—55); *Sun Oil Co.*, 22 FPC 851, rev'd, *United Gas Improvement Co. v. FPC*, No. 18,112, CA 5 (February 22, 1961) (Opinion printed Shell Pet. 56—66, 69—85); *The Superior Oil Co.*, 22 FPC 369, rev'd, *United Gas Improvement Co. v. FPC*, No. 18,113, CA 5 (February 22, 1961) (Opinion printed Shell Pet. 67—85).

to charge as error that the Court's decision imposes a burden on the Commission to insure the full protection of consumers by adequate price conditions. Indeed, such consumer protection is the prime reason for gas rate regulation. Second, the Federal Power Commission itself does not appear to share petitioners' views that its procedures will be crippled by the requirement of a "careful scrutiny and responsible reaction to initial price proposals of producers under §7", for the Commission is not now seeking issuance of a Writ of Certiorari. Third, the fact that the Federal Power Commission cannot rely on prices certificated under an erroneous view of law is hardly a procedural handicap or limitation on the Commission's discretion in authorizing producer sales. It can and should follow the course suggested in *CATCO*, and condition the certification as to price pending further and fuller information and analysis of producer costs and revenue needs.

Conclusion

For the foregoing reasons, it is respectfully requested that the petitions for certiorari be denied.

Respectfully submitted,

DAVID BERGER
City Solicitor and Principal Law Officer
LEWIS KATES
Deputy to the City Solicitor
City Hall Annex
Philadelphia 7, Pa.
WILLIAM C. BURT
ROBERT M. BECKMAN
KOTEEN & BURT
1000 Vermont Ave., N. W.
Washington 5, D. C.
Attorneys for the City of Philadelphia